

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC.,) CV-08-3468-JF
)
 PLAINTIFF,) SAN JOSE, CALIFORNIA
)
 VS.)
) MAY 1, 2009
 STUDIVZ, LTD, ET AL,)
)
 DEFENDANT.) PAGES 1-32
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEI
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF: ORRICK HERRINGTON & SUTCLIFFE
BY: THOMAS J. GRAY
4 PARK PLAZA, STE 1600
IRVINE, CA 92614

FOR THE DEFENDANT: GREENBERG GLUSKER
BY: STEPHEN SMITH
WILLIAM WALKER
1900 AVENUE OF THE STARS
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LOS ANGELES, CA 90067

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR,
CERTIFICATE NUMBER 13185

1 FOR THE PLAINTIFF: ORRICK HERRINGTON & SUTCLIFFE
2 BY: JULIO AVALOS
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1 SAN JOSE, CALIFORNIA

MAY 1, 2009

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: THE NEXT AND FINAL MATTER IS
6 FACEBOOK VERSUS STUDIVZ.

7 MR. SMITH: GOOD MORNING, YOUR HONOR.

8 STEVEN SMITH AND WILLIAM WALKER ON BEHALF
9 OF DEFENDANTS STUDIVZ, HOLTZBRINCK NETWORKS AND
10 HOLTZBRINCK VENTURES.

11 MR. GRAY: GOOD MORNING, YOUR HONOR.

12 TOM GRAY AND JULIO AVALOS ON BEHALF OF
13 FACEBOOK.

14 THE COURT: GOOD MORNING.

15 WELL, LET ME ASK STUDIVZ A QUESTION.
16 THERE ARE SEVERAL MOTIONS THAT ARE BUMPING AROUND.
17 THERE ARE JURISDICTIONAL MOTIONS THAT ARE NOT
18 BEFORE THE COURT THIS MORNING BECAUSE OF SOME
19 ONGOING DISCOVERY DISPUTES.

20 I THINK IT'S KIND OF A DISCRETIONARY
21 DETERMINATION FOR THE COURT TO MAKE, WHETHER IT
22 WANTS MAKE UP THE FOREIGN NON CONVENIENS MOTION
23 BEFORE THE JURISDICTIONAL ISSUES ARE FULLY
24 PRESENTED.

25 I'M PREPARED TO DO IT, AND I'M PREPARED

1 NOT TO DO IT. I'D LIKE TO GET FEEDBACK FROM BOTH
2 PARTIES. I KNOW FACEBOOK HAS BEEN ANXIOUS TO GET
3 THESE MATTERS HEARD, BUT WHAT'S YOUR VIEW?

4 MR. SMITH: STUDIVZ AND HOLTZBRINCK'S
5 VIEW IS THEY SHOULD BE HEARD NOW, SEPARATE AND
6 APART FROM JURISDICTION, FOR REASONS WE BRIEFED
7 BEFORE.

8 BRIEFLY, THE SINOCHM CASE, WHICH IS THE
9 U.S. SUPREME COURT CASE, TALKS ABOUT CIRCUMSTANCES
10 THAT ARE PRESENT HERE THAT FORM CAN BE CONSIDERED
11 FIRST.

12 THE COURT: I KNOW I HAVE SINOCHM. IF
13 IT SAYS NOTHING ELSE, IT SAYS I HAVE DISCRETION TO
14 DO IT. I'M TRYING TO DETERMINE WHAT YOUR
15 PREFERENCE IS.

16 MR. SMITH: MY PREFERENCE TO HAVE THE
17 FORUM NON CONVENIENS HEARD FIRST.

18 WE DO HAVE AN OUTSTANDING DISCOVERY
19 DISPUTE THAT IS A -- ALTHOUGH WE RESPECTFULLY
20 DISAGREED WITH FACEBOOK'S ISSUE ON IT, IT'S A
21 COMPLICATED ISSUE. SO THE FORUM ISSUE SHOULD BE
22 HEARD FIRST BECAUSE IT'S CLEAN.

23 THE COURT: AND FACEBOOK, I TAKE IT,
24 DISAGREES WITH THAT?

25 MR. GRAY: YES, YOUR HONOR, WE DO.

1 YOUR HONOR, I THINK YOU'VE HIT THE NAIL
2 ON THE HEAD WITH RESPECT TO WHAT THIS MOTION TODAY
3 IS ALL ABOUT IN TERMS OF PREVENTING AND AVOIDING
4 DISCOVERY IN THIS ACTION.

5 THE COURT: WHY ISN'T THAT A GOOD THING?

6 MR. GRAY: WELL, IT'S NOT A GOOD THING
7 BECAUSE PLAINTIFF HAS RIGHTFULLY BROUGHT U.S. AND
8 CALIFORNIA-BASED CLAIMS HERE BEFORE THIS COURT FOR
9 INJURY IT SUFFERED HERE.

10 BUT TO ANSWER YOUR QUESTION REGARDING
11 SINOCHM, I'M NOT SURE THAT SINOCHM DOES GRANT YOU
12 FULL DISCRETION TO HEAR THE FORUM NON CONVENIENS
13 PORTION OF THEIR MOTION AT THIS TIME.

14 IF YOU LOOK AT SINOCHM, PAGE 433, 549 US
15 433, THE COURT SAYS THERE SHOULD BE NO ASSUMPTION
16 OF LAW DECLARING POWER UNLESS THE COURT FINDS THAT
17 THE FORUM NON CONVENIENS MOTION IS SO CLEAR, AS IT
18 DID IN THE SINOCHM CASE, WHERE IT WAS ALL FOREIGN
19 PARTIES DISPUTING EVENTS THAT OCCURRED IN A FOREIGN
20 LOCALE.

21 THE COURT: YOU ARE DISTINGUISHING
22 SINOCHM ON ITS FACTS. THE COURT HAS DISCRETION,
23 AND LIKE MOST DISCRETION THERE ARE LIMITS ON IT,
24 BUT THE COURT CAN STILL LOOK AT THE FORUM FACTORS
25 AND DECIDE IF THEY ARE CLEAR.

1 I AGREE THEY HAVE TO BE PRETTY STRONG AND
2 THE JURISDICTIONAL ISSUES HAVE TO BE STICKY, WHICH
3 THEY ARE HERE, AND UNDER THOSE CIRCUMSTANCES THE
4 COURT HAS DISCRETION.

5 YOU ARE SAYING THAT I THINK, ULTIMATELY,
6 THAT THE FORUM FACTORS ARE NOT NEARLY AS CLEAR IN
7 SINOCHEM.

8 MR. GRAY: THAT'S CORRECT, YOUR HONOR.

9 I THINK, IN THIS INSTANCE, THERE'S A LOT
10 OF DISPUTE OF FACTUAL ISSUES.

11 THE COURT: I STARTED WITH COUNSEL, BUT
12 I'M GOING TO FOCUS MY QUESTIONS ON YOU AT THIS
13 POINT.

14 YOU KNOW, GERMANY ISN'T EXACTLY -- WHO DO
15 I INSULT HERE -- GERMANY ISN'T SOMALIA, IT'S NOT A
16 FAILED STATE WITH NO LEGAL SYSTEM AND NO RECOURSE.
17 IT'S A VERY SOPHISTICATED LEGAL SYSTEM. AND, IN
18 FACT, THESE VERY PARTIES ARE LITIGATING CLOSELY
19 RELATED CLAIMS IN GERMANY.

20 SO GIVEN THAT, GIVEN THAT THERE ARE
21 STICKY JURISDICTIONAL QUESTIONS, GIVEN THERE'S NO
22 REASON TO THINK THAT A GERMAN COURT WOULDN'T OR
23 COULDN'T CONSIDER THE UNIQUE CALIFORNIA CLAIMS
24 FACEBOOK HAS, WHY SHOULD THERE BE LITIGATION GOING
25 ON IN TWO DIFFERENT FORUMS OVER CLOSELY RELATED

1 ISSUES WHEN A LOT OF THE CRITICAL DEFENSE WITNESSES
2 ARE IN GERMANY, A LOT OF THE MISCONDUCT THAT'S
3 ALLEGED TOOK PLACE IN GERMANY?

4 IT MAY NOT BE SINOCHM, BUT IT STRIKES
5 ME, AT LEAST SUPERFICIALLY, AS BEING PRETTY CLOSE
6 THAT THERE ARE A LOT OF CONVENIENCE FACTORS AND
7 JUDICIAL ECONOMY FACTORS THAT ARE IN FAVOR OF
8 GERMANY.

9 I NEED TO UNDERSTAND WHAT CAN'T FACEBOOK
10 GET IN GERMANY THAT IT COULD GET IN CALIFORNIA?
11 WHAT'S THE HARM?

12 MR. GRAY: FIRST OFF, TAKING A STEP BACK,
13 OBVIOUSLY, THE DEFENDANTS RELY HEAVILY ON THE FACT
14 THAT THERE IS ANOTHER CASE IN GERMANY, AS WE
15 POINTED OUT IN OUR BRIEF, THE ADELSON CASE, THE
16 DOLE CASE, THE HAYES CASE, ALL OF THESE CASES SAY
17 THAT DUPLICATIVE LITIGATION ISN'T A FACTOR UNDER
18 FORUM NON CONVENIENS ANALYSIS.

19 THE COURT: WELL, DOLE, IT JUST SO
20 HAPPENS -- THERE'S SERENDIPITY, BUT IF YOU ARE A
21 JUDGE LONG ENOUGH THESE THINGS HAPPEN.

22 I WAS ON THE PANEL IN DOLE, AND THE
23 ANALYSIS IN THAT CASE IS WHERE IS THE BRUNT OF THE
24 HARM? WHERE IS THE CENTER OF GRAVITY OF THE
25 DISPUTE? AND, YOU KNOW, I THINK THERE'S A DESCENT

1 ARGUMENT THAT THE CENTER OF GRAVITY IN THIS CASE IS
2 IN GERMANY.

3 MR. GRAY: THE CENTER OF GRAVITY OF THE
4 HARM TO FACEBOOK, AS A LOCAL ENTITY WITH ITS
5 PRINCIPAL PLACE OF BUSINESS RIGHT UP THE STREET IN
6 PALO ALTO, CALIFORNIA.

7 YES, THEY'VE GOT USERS IN GERMANY THAT
8 THEY UNFAIRLY AND IMPROPERLY GAINED BECAUSE OF
9 THEIR ACTIONS IN GERMANY, BUT THE BRUNT OF ECONOMIC
10 INJURIES ARE SUFFERED HERE.

11 AND WE ALSO HAVE TO LOOK, WHICH THE
12 DEFENDANTS DON'T LOOK AT MUCH AT ALL, THERE ARE
13 DEFENDANT USERS IN CALIFORNIA AND THROUGHOUT THE
14 UNITED STATES.

15 SO THERE IS HARM TO FACEBOOK'S
16 INTELLECTUAL PROPERTY RIGHT HERE IN CALIFORNIA WITH
17 OVER 11,000 USERS, AND PROBABLY TENS OF THOUSANDS,
18 IF NOT HUNDREDS OF THOUSANDS OF USERS, THROUGHOUT
19 THE UNITED STATES.

20 AGAIN, AT THIS EARLY STAGE OF THIS CASE
21 WITH NO DISCOVERY PROVIDED FOR MANY PARTS OF THE
22 DESIGN DEVELOPMENT AND THE ACTIONS TAKEN BY
23 DEFENDANTS IN GERMANY, FACEBOOK IS AT A
24 DISADVANTAGE OF COMING FORTH --

25 THE COURT: TO GET BACK TO MY EARLIER

1 QUESTION, WHAT CAN'T YOU GET IN GERMANY THAT YOU
2 CAN GET IN CALIFORNIA? I REALIZE THAT'S NOT THE
3 ONLY QUESTION THE COURT HAS TO LOOK AT, BUT JUST IN
4 TERMS OF CONVENIENCE AND ECONOMY.

5 IF YOU HAVE YOUR WAY, WE ARE GOING TO
6 HAVE PARALLEL LITIGATION GOING ON IN TWO DIFFERENT
7 CONTINENTS ABOUT SOME OF THE SAME DISPUTED FACTS
8 AND INVOLVING A LOT OF THE SAME PEOPLE.

9 WHY DOES THAT MAKE SENSE? WHY DO THE
10 EQUITIES FAVOR THAT RATHER THAN HAVING ONE COURT IN
11 A CIVILIZED INDUSTRIAL COUNTRY MAKING A
12 DETERMINATION OF THE PARTIES' RIGHTS.

13 MR. GRAY: BECAUSE THE CLAIMS ARE
14 DIFFERENT HERE, YOUR HONOR. THESE ARE LARGEMLY U.S.
15 BASED FEDERAL CLAIMS.

16 AGAIN, IT'S DEFENDANT'S BURDEN TO COME
17 FORWARD TO SHOW THAT THESE CLAIMS WOULD BE
18 DUPLICATIVE, THAT ALL THE WITNESSES AND ALL THE
19 EVIDENCE WOULD BE DUPLICATIVE OF WHAT'S GOING ON IN
20 GERMANY.

21 AND THEY CAN'T DO THAT BECAUSE THE TRADE
22 DRESS CLAIMS HAS DIFFERENT ELEMENTS AND DIFFERENT
23 ISSUES AND WOULD REQUIRE DIFFERENT TESTIMONY FROM
24 DIFFERENT WITNESSES THAT WOULD BE GOING FORWARD ON
25 THE UNFAIR COMPETITION OF COPYRIGHT CLAIMS.

1 THE COURT: THEY ARE CLOSELY RELATED,
2 THOUGH, AREN'T THEY? I MEAN, IT'S A FORM OF UNFAIR
3 COMPETITION -- IT'S NOT COMMON LAW AND UNFAIR
4 COMPETITION, BUT IT'S MISUSING A PARTY'S PRESENCE
5 IN THE MARKETPLACE IN A WAY THAT'S UNFAIR.

6 THERE'S A COMMON THREAD IN ALL OF THESE
7 THINGS.

8 MR. GRAY: THERE'S CERTAINLY A COMMON
9 THREAD IN THE FACT THAT, YOU KNOW, IT'S A TRADEMARK
10 RELATED ISSUE AND UNFAIR COMPETITION IS TRADEMARK
11 RELATED. BUT THE TRADE DRESS CLAIM HERE HAS AN
12 ELEMENT THAT THE DESIGN HAS TO BE A NON-FUNCTIONAL
13 DESIGN.

14 THAT'S NOT AN ELEMENT AT ISSUE IN THE
15 GERMAN CASE. THAT WILL REQUIRE DIFFERENT
16 TESTIMONY, DIFFERENT EXPERTS, DIFFERENT DOCUMENTS
17 THAT WILL BE HERE, AND FACEBOOK WILL BE
18 INCONVENIENCED FOR HAVING TO BRING ALL THOSE PEOPLE
19 TO GERMANY.

20 SO THAT IS ONE ASPECT. BUT THERE'S ALSO
21 THE COMPUTER TRESPASS CLAIMS. THOSE ARE NOT AT
22 ISSUE IN THE GERMAN CASE. THOSE ARE VERY DISTINCT
23 U.S. BASED CLAIMS, CALIFORNIA-BASED CLAIMS, THAT
24 AGAIN, WILL HAVE DIFFERENT WITNESSES REGARDING THE
25 ACTIONS ON THE PALO ALTO, U.S. BASED SERVERS THAT

FACEBOOK OWNS.

ONCE WE CAN GET DISCOVERY TO SEE HOW MANY
PEOPLE -- THE EXTENT OF THE INTERACTION ON
FACEBOOK'S CALIFORNIA SERVERS, WE CAN GO LOOK AND
SEE EXACTLY WHAT THEY'VE DONE.

BUT THOSE ARE VERY, VERY BROAD CLAIMS
THAT PREDICT THE EXACT TYPE OF ACTION WE HAVE HERE,
UNAUTHORIZED USE OR ACCESS TO A COMPUTER SYSTEM,
AND THAT UNAUTHORIZED USE WILL REQUIRE, AGAIN,
DIFFERENT WITNESSES AND DIFFERENT TESTIMONY,
DIFFERENT DOCUMENTS, DIFFERENT EVIDENCE THAT
CURRENTLY RESIDES RIGHT HERE IN CALIFORNIA THAT
WOULD NOT BE NEEDED IN THE CURRENT GERMAN --

THE COURT: OKAY. HOW FAR OFF ARE WE IN
TERMS OF GETTING THE JURISDICTIONAL MOTIONS TEED
UP? I KNOW YOU'RE IN THE MIDST OF OBJECTIONS AND
MOTIONS AND SO FORTH.

MR. GRAY: I THINK WE ARE BEYOND THAT.
IT'S NO SURPRISE THAT DEFENDANTS SWITCHED GEARS
AFTER JUDGE LLYOD INDICATED THAT HE WAS READY TO
REQUIRE THEM TO PRODUCE DISCOVERY REGARDING THE
DESIGN AND DEVELOPMENT DOCUMENTS RELATED TO THEIR
ACTIONS HERE IN THE U.S. ON THE U.S. SERVERS AND
HOW THEY DESIGN THEIR PRODUCT.

AS SOON AS JUDGE LLYOD INDICATED THAT

1 THAT WAS GOING TO HAPPEN, THEY PULLED BACK ON THEIR
2 PERSONAL JURISDICTION MOTION AND SAID, LET'S GO
3 FORWARD WITH THE FORUM --

4 THE COURT: THAT'S A STRATEGIC
5 OBSERVATION.

6 I'M SAYING -- MY QUESTION IS EXTREMELY
7 SIMPLE. HOW LONG WOULD IT TAKE -- IF I DENIED THE
8 FORUM NON CONVENIENS MOTION, HOW LONG WOULD IT TAKE
9 FOR THE JURISDICTION, PERSONAL SUBJECT MATTER
10 JURISDICTION -- I'M SORRY, PERSONAL JURISDICTION.
11 HOW LONG WOULD IT TAKE FOR THAT MOTION TO BE READY
12 TO BE HEARD?

13 MR. GRAY: OF COURSE, IT DEPENDS ON THE
14 DISCOVERY. IF WE CAN GET DISCOVERY IN 30 DAYS, THE
15 MOTION CAN BE HEARD 35 DAYS AFTER THAT, YOUR HONOR.

16 THE COURT: SO YOU DON'T KNOW, IN OTHER
17 WORDS.

18 MR. GRAY: WE DON'T KNOW BECAUSE THEY'VE
19 BEEN DRAGGING THEIR FEET.

20 THE COURT: IT WILL BE A COUPLE OF
21 MONTHS, AT LEAST.

22 MR. GRAY: CERTAINLY. A COUPLE OF MONTHS
23 TO GET THE DISCOVERY REVIEW, THE DISCOVERY, AND
24 WRITE UP THE SUPPLEMENTAL BRIEFS.

25 BUT IT SHOULD NOT BE SIX MONTHS OR A

1 YEAR, IT SHOULD BE RELATIVELY QUICK IF DEFENDANTS
2 COMPLY WITH THE DISCOVERY ISSUES.

3 THE COURT: AND APART FROM THE LEGAL
4 ANALYSIS THAT THERE ARE FREESTANDING U.S. CLAIMS,
5 THE PRACTICAL IMPACT OF THE CASE IN GERMANY IS THAT
6 FACEBOOK'S WITNESSES ON THE TRADE DRESS CLAIM AND
7 ON THE COMPUTER CLAIM ARE NOT WITNESSES WHO
8 OTHERWISE WOULD BE CALLED IN THE GERMAN ACTION AND
9 THEY WOULD HAVE TO GO TO GERMANY TO PARTICIPATE.

10 MR. GRAY: THAT'S THE INCONVENIENCE ON
11 THE PRIVATE FACTOR. BUT, OF COURSE, WE THINK THIS
12 COURT HAS SUBSTANTIAL PUBLIC INTEREST IN
13 ADJUDICATING THESE CLAIMS FROM A U.S. PLAINTIFF, OF
14 A LOCAL PLAINTIFF, THAT HAS SUFFERED FINANCIAL
15 INJURY HERE LOCALLY REGARDING U.S. BASED CLAIMS,
16 NOVEL AND SOMEWHAT UNIQUE U.S. BASED CLAIMS, AS WE
17 POINT OUT IN OUR BRIEF.

18 THE COURT: OVER A PARTY THAT IT MAY OR
19 MAY NOT HAVE JURISDICTION OVER. I MEAN, I DON'T
20 KNOW THAT. I MEAN, I SUPPOSE I COULD SPECULATE AS
21 TO HOW THAT'S GOING TO TURN OUT. THERE'S,
22 OBVIOUSLY, A MESSY FIGHT ABOUT JURISDICTION. IT'S
23 NOT A SELF-EVIDENT TYPE OF THING.

24 MR. GRAY: WELL, IT'S A MESSY FIGHT NOW.
25 WE THINK THERE'S CLEARLY JURISDICTION BASED ON THE

1 CONTEXT.

2 THE COURT: THAT'S WHY YOU SUED THEM
3 HERE.

4 MR. GRAY: EXACTLY. THAT'S WHY WE SUED
5 THEM HERE.

6 AND WE'RE ALSO NOT DEALING WITH THE FORUM
7 SELECTION CLAUSE AND TERMS OF USE. AND DEFENDANTS
8 RAISE SOME RED HERRING ISSUES WITH RESPECT TO
9 WHETHER THERE'S AN ARBITRATION PROVISION AFTER
10 DECEMBER 2006, OR WHETHER BOSTON SHOULD HAVE BEEN
11 THE FORUM BEFORE JUNE OF 2005.

12 BUT AS WE SUBMITTED, DURING THE CRUCIAL
13 RELEVANT TIME PERIOD HERE JUNE 2005 THROUGH 2006,
14 THERE WAS A CLICK THROUGH LICENSE --

15 THE COURT: I DON'T KNOW THAT YOU WANT TO
16 GO THERE, THOUGH. THAT'S AN INTERESTING FORUM
17 SELECTION CLAUSE BECAUSE THEY CONSENT TO
18 JURISDICTION BUT IT CERTAINLY IS NOT AN EXCLUSIVE
19 JURISDICTION.

20 WHEN I SAY "THEY," I MEAN WHOEVER,
21 ASSUMING THAT A PARTY IS BOUND BY THAT, THEY
22 CONSENT TO JURISDICTION, BUT IT'S NOT AN
23 EXCLUSIVE --

24 MR. GRAY: I WOULD DISAGREE, YOUR HONOR.
25 I WOULD SAY THAT THAT ARBITRATION PROVISION SAYS

1 THAT ACTIONS WILL BE CONDUCTED HERE IN
2 SANTA CLARA COUNTY RELATED TO THE BREACH OF THE
3 AGREEMENT AS WELL AS --

4 THE COURT: DOES IT SAY -- AND REFRESH ME
5 IF I'M WRONG ABOUT THIS. I DON'T BELIEVE IT SAYS
6 THAT THE COURT'S, FEDERAL AND STATE COURTS OR
7 WHATEVER OF SANTA CLARA COUNTY, SHALL HAVE
8 EXCLUSIVE AND SOLE EXCLUSIVE JURISDICTION. I DON'T
9 THINK THERE'S ANY LANGUAGE LIKE THAT.

10 MR. GRAY: IT CERTAINLY DOES MENTION THE
11 COURTS OF THIS JURISDICTION.

12 THE COURT: AND THERE'S NO QUESTION ABOUT
13 THAT, BUT I DON'T RECALL SEEING THE WORD
14 "EXCLUSIVE" IN THERE.

15 IF IT'S IN THERE, I MISSED IT. AND THE
16 NINTH CIRCUIT HAS HAD A LOST CASES ON THIS AND THEY
17 FOCUS ON THE PRESENCE OR ABSENCE OF THAT.

18 OKAY. WELL, I THINK THIS IS BOTH A LEGAL
19 AND A PRACTICAL INQUIRY. I APPRECIATE YOUR
20 COMMENTS.

21 LET ME GET A RESPONSE FROM THE
22 DEFENDANTS.

23 MR. SMITH: THERE WERE A NUMBER OF THINGS
24 SAID THERE, YOUR HONOR. I WILL TRY TO BE AS BRIEF
25 AS POSSIBLE.

YOUR FIRST QUESTION FOCUSED, THOUGH, ON
WHAT TYPE OF RELIEF FACEBOOK IS UNABLE TO GET IN
GERMANY THAT IT CAN GET HERE.

WITH ALL DUE RESPECT, I THINK IF YOU LOOK AT THE COMPLAINTS IN GERMANY, AND THERE ARE NOW TWO IN THE CLONE ACTION, I THINK AN 82 PAGE FIRST ONE AND THEN AN AMENDED ONE THAT WAS FILED MORE RECENTLY ABOUT A MONTH OR TWO AGO, EVERY SINGLE FACTUAL ALLEGATION AND EVERY TYPE OF RELIEF THAT IS BEING SOUGHT IN THIS CASE IS BEING SOUGHT THERE.

YES, THEY ARE CALLED DIFFERENT THINGS IN
GERMANY.

THE COURT: THERE'S DIFFERENT THEORIES,
BUT WHAT THEY ARE LOOKING FOR IS THE SAME.

MR. SMITH: THAT IS CORRECT.

AND THE LAW IS QUITE CLEAR, I THINK, IN THE FORUM. THERE IS A LOT OF LAW ON THIS ISSUE, BUT YOU DON'T HAVE TO HAVE THE SAME LABEL ON THE CLAIM; AND IN FACT, IT'S EVEN REALLY BETTER FOR US THAT WE DON'T NEED IT HERE.

THE COURT: WELL, BASICALLY WHAT COUNSEL IS SAYING, WHEN IT COMES DOWN TO IT, IS THAT THERE ARE SOME SETS OF WITNESSES GIVEN THESE CLAIMS THAT AREN'T IN THE GERMAN CASE WHO WOULD BE INCONVENIENCED; AND I THINK THAT'S CERTAINLY

1 ENTITLED TO SOME WEIGHT.

2 AND THE OTHER THING HE'S SAYING, WHICH I
3 THINK IS PROBABLY THE MORE COMPELLING POINT, IS
4 THIS IS A LOCAL COMPANY WHICH IS ENTITLED TO EXPECT
5 THE PROTECTIONS OF A LOCAL FORUM.

6 AND, CLEARLY, SOME OF THE RELEVANT FACTS
7 IN THIS CASE ARISE HERE. IT'S NOT -- NOTHING IS
8 HAPPENING IN PALO ALTO. AND THEY BELIEVE THEY HAVE
9 A GOOD ARGUMENT ON PERSONAL JURISDICTION WHICH THE
10 COURT HASN'T BEEN ABLE TO ADDRESS YET.

11 SO AT LEAST UNTIL THE COURT IS ABLE TO
12 ADDRESS THAT, WHY SHOULD WE SAY TO A LOCAL PARTY
13 THAT HAS A RIGHT TO RELY ON ACCESS TO THE LOCAL
14 COURTS, PARTICULARLY WHERE THERE IS A FORUM
15 SELECTION CLAUSE AND WHETHER IT'S EXCLUSIVE AND
16 BINDING IN EVERY CASE -- WHICH IS SOMETHING I
17 HAVEN'T DETERMINED YET -- WHY SHOULD WE SAY YOU
18 NEED TO GO TO GERMANY BECAUSE THERE'S A CASE
19 PENDING OVER THERE THAT INVOLVES SOME OF THE SAME
20 PARTIES AND CLAIMS?

21 IF WE DON'T HAVE JURISDICTION OVER YOUR
22 CLIENT THEN IT'S EASY, THEN YOU HAVE TO GO TO
23 GERMANY. BUT IF THERE IS STILL A DETERMINATION TO
24 BE MADE AS TO WHETHER YOUR CLIENT IS SUBJECT TO
25 JURISDICTION, WHY SHOULD THE COURT JUMP THE GUN AND

1 SAY, GO AWAY?

2 MR. SMITH: WELL, LEGALLY, FOR THE EXACT
3 SAME REASONS IN SINOCHM. AND WE CAN DISCUSS WHAT
4 THE FACTS ARE ON POINT WITH THE SINOCHM VERSUS NOT
5 WITH THE LAW ON POINT.

6 THAT LAW IS ALSO ON POINT THAT A RESIDENT
7 PLAINTIFF, ALTHOUGH IT IS A FACTOR THAT IS ENTITLED
8 TO WEIGHT AND WE NEVER CLAIMED THE CONTRARY, IT IS
9 NOT A DISPOSITIVE FACTOR IN AND OF ITSELF.

10 AND IN THIS CASE IT'S NOT -- I HATE TO
11 PICK ON LITTLE OLD LADIES, BUT IT'S NOT A LITTLE
12 OLD LADY IN CALIFORNIA, WHOSE HUSBAND -- BECAUSE
13 ONE OF THE CASES INVOLVES THIS -- WHOSE HUSBAND WAS
14 KILLED BY TERRORISTS IN EGYPT AND HER ASKING US TO
15 GO TO EGYPT TO SEEK REDRESS.

16 THIS IS A MULTINATIONAL COMPANY BY TWO
17 HUNDRED MILLION, BY THEIR OWN ESTIMATION --

18 THE COURT: AND A CORPORATE PRESENCE IN
19 GERMANY.

20 MR. SMITH: WITH A WEB SITE IN GERMANY
21 OPERATING ALL OVER THE WORLD. THE CONTACT LUMBER
22 CASE DISCUSSES THAT PARTICULAR ISSUE DIRECTLY.

23 IN ADDITION, THEY, THEMSELVES, ARE
24 LITIGATING. WE ARE NOT -- WE ARE NOT TRYING TO
25 FORCE THEM INTO SOME FORUM --

1 THE COURT: THEY'RE THE PLAINTIFF.

2 MR. SMITH: THAT'S CORRECT. THEY ARE THE

3 PLAINTIFF, YES THE STUTTGART ACTION WHICH WAS A
4 DECLARATORY RELIEF ACTION STUDIVZ FILED, WAS FILED
5 FIRST. THERE ARE TWO CASES WE SIGHT BOTH CREATIVE
6 AND LOCKMAN, WHERE THAT EXACT SAME THING HAPPENED.

7 THE COURT DID NOT HAVE ANY ISSUE WITH THAT.

8 THE COURT ACTUALLY DID RELY UPON THE FACT
9 THAT THERE WAS ANOTHER PIECE OF LITIGATION ALREADY
10 PENDING. SOME CONTRARY, WITH ALL DUE RESPECT TO
11 MR. GRAY'S STATEMENT, BUT IT'S NOT A FACTOR. IT'S
12 A FACTOR IN SINOCHM, IT'S A FACTOR IN CREATIVE,
13 IT'S A FACTOR IN CONTACT LUMBER, AND IT'S A FACTOR
14 IN LOCKMAN.

15 IT'S A FACTOR IN ALL KINDS OF CASES. AND
16 IT'S USUALLY QUITE AN IMPORTANT FACTOR FOR THE
17 REASON YOUR HONOR ALREADY NOTED, WHICH IS, IT
18 DOESN'T MAKE SENSE, FROM A JUDICIAL ECONOMY
19 PERSPECTIVE, TO FIGHT OVER THE SAME FACTS SEEKING
20 THE SAME RELIEF IN TWO DIFFERENT PLACES.

21 IN ADDITION, SPECIFICALLY AS TO THE
22 COMPUTER ABUSE ACT, WE'VE NOTED THIS IN OUR BRIEFS
23 AND IT'S IN THE PLEADINGS IN GERMANY. THEY ARE
24 SEEKING REDRESS SPECIFICALLY FOR THAT. RIGHT NOW
25 THERE IS PENDING A REQUEST FOR A NEUTRAL EXPERT

1 SEARCH OF THE ENTIRE PREMISES, INSPECTION OF ALL
2 THE COMPUTER SYSTEMS, ALL THE SERVERS, ALL OF THE
3 SOURCE CODE, TO GET INTO WHETHER OR NOT THAT TYPE
4 OF ACCESS THAT THEY'RE TALKING ABOUT DID, IN FACT,
5 OCCUR.

6 SO YES, THEY DON'T CALL IT THE COMPUTER
7 ABUSE ACT, BUT WITHIN THE CASE, AS A FACTUAL AND
8 LEGAL MATTER UNDER A DIFFERENT LABEL, THE EXACT
9 SAME THING IS BEING LAID.

10 THE COURT: CAN I ASK YOU THIS -- THIS
11 MAY COME OUT OF LEFT FIELD -- BUT I HAVE DISCRETION
12 UNDER 1404 TO STAY AS WELL AS DISMISS, CORRECT?

13 MR. SMITH: I BELIEVE SO, YOUR HONOR.

14 THE COURT: I COULD JUST SAY, WELL, LET'S
15 JUST STOP THE BLEEDING IN THIS CASE AND GO FIGHT
16 GERMANY FOR A WHILE, AND THEN IF THINGS ARE -- IF
17 YOU CAN'T GET A COMPLETE RESOLUTION BETWEEN THE
18 PARTIES, THEN THIS CASE CAN BE TAKEN OUT OF THE
19 FREEZER AT A LATER DATE.

20 THAT'S AN OPTION THE COURT HAS, ISN'T IT?

21 MR. SMITH: THAT'S CORRECT. AND ALTHOUGH
22 THAT'S A SECONDARY OPTION --

23 THE COURT: THAT'S NOT WHAT YOU ASKED FOR
24 BUT IT'S SOMETHING THE COURT CAN DO.

25 MR. SMITH: RELEVANT TO THAT, YOUR HONOR,

1 BECAUSE THIS HEARING GOT MOVED A COUPLE OF WEEKS
2 BECAUSE OF DEFENSE COUNSEL'S VACATIONS WHICH IS
3 FINE, THE COMMENCEMENT OF THE TRIAL DID, IN
4 GERMANY, STARTED JUNE -- THERE IS A DATE NOW
5 JUNE 16TH FOR THE RENDITION OF A JUDGMENT.

6 NOW, I DON'T WANT TO SAY THAT MEANS THEY
7 WILL RENDER A FINAL JUDGMENT, I DON'T WANT TO
8 MISLEAD THE COURT, BUT IT IS A DATE TO EITHER
9 DECIDE, ARE WE GOING TO RENDER A FINAL JUDGMENT, A
10 PARTIAL JUDGMENT, OR ARE WE GOING TO ASK FOR
11 SOMETHING MORE?

12 SO THERE IS THAT NEXT DATE OUT THERE.

13 AGAIN, I DON'T -- I THINK THE FORUM ISSUE HERE IS
14 TEED UP, AND WITH THE FACTORS WEIGHING SO HEAVILY
15 IN OUR CLIENT'S FAVOR, IT SHOULD BE DISMISSED

16 THE COURT: BUT IF I WERE TO STAY THIS
17 CASE UNTIL AFTER A JUDGMENT IS RENDERED IN THE
18 GERMAN COURT, THEN AT THAT POINT WE COULD
19 RECONVENE, WE COULD CONSIDER WHAT THE PRECLUSIVE
20 EFFECT, IF ANY, OF THAT JUDGMENT IS AND WHERE IT
21 LEAVES THE PARTIES, AND THEN THE COURT COULD DECIDE
22 WHETHER TO GO FORWARD IN THIS CASE OR NOT.

23 THAT'S ANOTHER OPTION THE COURT HAS.

24 MR. SMITH: THAT IS CORRECT.

25 AND JUST ONE EFFORT TO PERSUADE

1 YOUR HONOR OF THE FIRST OPTION, LET ME MAKE THIS
2 POINT, WHICH IS: I THINK WE SHOULD STEP BACK HERE
3 FOR A SECOND AND TALK ABOUT WHAT'S ACTUALLY BEING
4 SOUGHT. BECAUSE IF WE LOOK AT WHAT'S GOING ON
5 HERE, FACEBOOK IS TRYING TO RECOVER FOR HARM THAT
6 IS OCCURRING IN GERMANY.

7 IF YOU LOOK AT THEIR SUPPLEMENTAL REPLY
8 THEY FILED, THEY HAVE THE NUMBER \$100 MILLION IN
9 DAMAGES. THAT'S A TELLING STATEMENT BECAUSE
10 THERE'S NO WAY THERE'S \$100 MILLION IN DAMAGES FOR
11 ACTIVITY THAT OCCURRED IN THE UNITED STATES.
12 THAT'S THE ENTIRE VALUE OF STUDIVZ. THEY ARE
13 SEEKING AN INJUNCTION TO SHUT DOWN STUDIVZ
14 ALTOGETHER.

15 SO THERE'S BEEN NO ARGUMENT THAT WE
16 SHOULD BE ALLOCATING SOMETHING TO THE UNITED STATES
17 ONLY HERE. SO WHAT'S GOING TO HAPPEN IN GERMANY --
18 AND THE GERMAN COURT IS WELL AWARE OF THE PENDENCY
19 OF THIS CASE BECAUSE IT WAS DISCUSSED ON THE
20 APRIL 28TH TRIAL. MAYBE WE WAIT TO SEE AND I CAN
21 BRIEF IT AND GO THROUGH IT, BUT IT'S CLEAR IT'S
22 GOING TO HAVE A PRECLUSIVE EFFECT.

23 AND IN THE CASE -- ONE OF THE CASES SAID
24 WHEN YOU HAVE THE INFRINGEMENT OCCURRING FROM
25 SINGAPORE, THE BEST PLACE TO GO, IF YOU ARE GOING

1 TO SHUT DOWN THE INFRINGING PARTY, IS THE SOURCE.

2 THE COURT: YEAH.

3 MR. SMITH: AND THAT'S EXACTLY WHAT THEY
4 ARE DOING.

5 THE COURT: ALL RIGHT.

6 LET ME GET A REACTION FROM COUNSEL,
7 BECAUSE I DON'T WANT TO SPRING A SURPRISE ON
8 ANYBODY.

9 WHAT WOULD THE EFFECT BE ON FACEBOOK IF
10 THE COURT SIMPLY SAID, ALL RIGHT, STOP THE
11 CALIFORNIA ACTION IN ITS TRACKS UNTIL THE GERMAN
12 COURT RULES AND THEN WE WILL SEE WHAT'S GOING ON?

13 MR. GRAY: WELL, THE DEVIL WOULD BE IN
14 THE DETAILS THEN, YOUR HONOR.

15 ARE WE SAYING FACEBOOK HAS TO BRING ITS
16 CALIFORNIA AND U.S. BASED CLAIMS IN THE GERMAN
17 ACTION? BECAUSE THEN, AGAIN, WE FEEL THAT'S NOT
18 WARRANTED AND PROPER IN THIS INSTANCE BASED ON THE
19 STRONG DEFERENCE THAT SHOULD BE PROVIDED TO
20 FACEBOOK FOR LITIGATING THESE CLAIMS IN THIS
21 COURTROOM.

22 THE COURT: I'M NOT EVEN SURE THAT'S
23 POSSIBLE IF THE COURT HAS ALREADY CONDUCTED AN
24 EVIDENTIARY PROCEEDING.

25 MR. GRAY: OKAY. LET ME CLARIFY THAT.

1 WITH ALL DUE RESPECT TO COUNSEL, THAT

2 JUNE --

3 THE COURT: THAT'S ABOUT THE THIRD TIME I
4 HEARD THAT PHRASE TODAY, I'M GETTING WORRIED.

5 MR. GRAY: WELL, MAYBE -- BECAUSE HE
6 VASTLY OVERSTATES WHAT'S GOING ON IN GERMANY.

7 THERE HAS NOT BEEN A TRIAL. WHAT OCCURRED ON
8 TUESDAY WAS ESSENTIALLY A STATUS CONFERENCE. THE
9 PARTIES CAME IN, THEY DISCUSSED THE CASE, FACEBOOK
10 WAS GIVEN AN OPPORTUNITY TO DISCUSS -- TO BRIEF,
11 ADDITIONALLY, THE CLAIM THAT HE'S TALKING ABOUT
12 WHICH IS A COPYRIGHT INSPECTION CLAIM, IT IS NOT
13 THE COMPUTER FRAUD TRESPASS CLAIM.

14 SO GOING INTO STUDIVZ AND THE DEFENDANT'S
15 HEADQUARTERS TO GET ALL THE DOCUMENTS AND ACCESS TO
16 THE COMPUTERS, IS AN INSPECTION OF THEIR SOURCE
17 CODE CLAIM. IT IS NOT RELATED TO THE COMPUTER
18 FRAUD AND ABUSE ACT --

19 THE COURT: LET ME REPHRASE MY QUESTION
20 WITH PARTICULARITY.

21 IS WHAT EMANATES FROM THE GERMAN COURT IN
22 JUNE LIKELY TO HAVE SOME TYPE OF PRECLUSIVE EFFECT
23 ON THE CLAIMS THAT FACEBOOK HAS BROUGHT IN
24 CALIFORNIA?

25 MR. GRAY: IT MAY.

1 BUT MY UNDERSTANDING IS WHAT'S GOING TO
2 HAPPEN IN JUNE IS THE COURT IS GOING TO SET THE
3 SCHEDULE FOR THE SOURCE CODE INSPECTION CLAIM, THE
4 SOURCE CODE COPYRIGHT CLAIM, WHICH MAY TAKE SIX TO
5 NINE MONTHS TO ADJUDICATE, AND THEN THERE WILL BE A
6 TRIAL ON THE MERITS -- EVIDENTIARY HEARING ON THE
7 MERITS AFTER THAT.

8 THE COURT: SO IT WOULD BE CLEANER IF THE
9 COURT SAID YAY OR NAY WITH THE REGARD TO THE FORUM
10 NON CONVENIENS.

11 MR. GRAY: IT'S CLEANER -- I DON'T THINK
12 THERE'S ANY REASON TO DELAY UNTIL AFTER JUNE
13 BECAUSE I DON'T THINK JUNE IS GOING TO BE
14 DISPOSITIVE.

15 THE COURT: THAT'S MY QUESTION.

16 SO A STAY REALLY WOULDN'T GET YOU
17 ANYWHERE. YOU'D RATHER EITHER GET SENT THERE AND
18 AND/OR NOT GO THERE AT ALL; AND OBVIOUSLY, YOU
19 PREFER THE LATTER.

20 MR. GRAY: RIGHT. I THINK WE DESERVE TO
21 BE HERE.

22 AND I THINK WHAT COUNSEL HAS SAID
23 REGARDING THE GERMAN CASE IS LARGEMLY INDICATIVE OF
24 WHAT WE'VE GOT HERE. THERE'S A BIG DISPUTE AGAIN,
25 A FACTUAL DISPUTE, TO THE SIMILARITY OF THE GERMAN

1 CASE VERSUS THE CASE HERE.

2 AND AS THESE CASES HAVE DISCUSSED, THE
3 RECORD OF DEFENSE COUNSEL AND PLAINTIFF'S COUNSEL
4 SAYING WHAT THEIR INTERPRETATION IS OF WHAT'S GOING
5 ON IN THE ALTERNATIVE FORUM REALLY DOESN'T CARRY
6 THE DAY FOR THE DEFENDANTS UNDER A FORUM NON
7 CONVENIENS ANALYSIS.

8 THEY NEED TO COME IN AND SHOW THAT IT IS
9 DUPLICATIVE, AND ALL WITNESSES AND ALL TESTIMONY
10 WOULD BE --

11 THE COURT: AND THAT'S THE CALL I NEED TO
12 MAKE. THAT'S WHAT SINOCHM SAYS. THAT'S THE
13 STANDARD. I MEAN, IT'S GOT TO BE, ESSENTIALLY, THE
14 SAME CASE. AND YOU GOT A COUPLE BELLS AND WHISTLES
15 ON IT HERE THAT THEY DON'T HAVE THERE, BUT IN ORDER
16 FOR THE COURT TO TRANSFER AT THIS STAGE IT WOULD
17 HAVE TO FIND IT WAS ESSENTIALLY THE SAME CASE, IT
18 WAS ARISING OUT OF THE SAME DISPUTE, AND OF COURSE
19 THERE'S DIFFERENT CLAIMS FOR RELIEF AND DIFFERENT
20 LEGAL THEORIES AND LEGAL SYSTEMS.

21 MR. GRAY: BUT BEYOND THAT, IT'S
22 DEFENDANT'S BURDEN TO COME FORWARD TO OVERCOME THE
23 SUBSTANTIAL DEFERENCE HERE. AND IF WE LOOK AT THE
24 ADELSON CASE, THE HAYES BICYCLE CASE, THE ALNWICK
25 V. EUROPEAN MICRO, 137 F. SUPP.2D 112, IN WHICH IT

1 SPECIFICALLY SAYS THE AFFIDAVITS OF THE ATTORNEYS
2 IS INSUFFICIENT TO SHOW THE DUPLICATIVE NATURE OF
3 THE TWO LITIGATIONS, AND THEREFORE IT SHOULDN'T BE
4 GIVEN ANY WEIGHT WHATSOEVER WITH RESPECT TO FORUM
5 NON CONVENIENS.

6 EVEN THOUGH IN THESE CASES ADELSON AND
7 HAYES BICYCLE AND DOLE, PLAINTIFFS THEMSELVES FILED
8 SUIT IN THE OTHER JURISDICTION.

9 IF I MAY, YOUR HONOR, THE CREATIVE AND
10 THE LOCKMAN CASE ARE CLEARLY DISTINGUISHABLE. THE
11 REASON THAT THE ALTERNATIVE FORUMS WERE AT ISSUE IN
12 THOSE CASES IS BECAUSE ALMOST ALL OF THE OTHER
13 ACTIONS OCCURRED IN THOSE ALTERNATIVE FORUMS.

14 IN THE CREATIVE LABS CASE, THE PARTIES,
15 ALTHOUGH THEY WERE SUING UNDER THEIR AMERICAN
16 SUBSIDIARIES, THE COURT RECOGNIZED THAT THE PRIMARY
17 PARTIES WERE THE SINGAPORE COMPANIES.

18 THEY WERE FIGHTING OVER THE MANUFACTURE
19 OF SINGAPORE PRODUCTS MANUFACTURED IN SINGAPORE.
20 THE PRIMARY PARENT COMPANIES WERE BOTH SINGAPORE
21 COMPANIES. THE INFRINGEMENT WAS OCCURRING IN
22 SINGAPORE BUT THEY DECIDED TO COME TO THE U.S. THE
23 COURT SAID NO IN ADELSON.

24 AND WHAT THE COURT DID SAY ON PAGE TEN OF
25 THAT OPINION IS, IT'S NOT A CASE OF PIRACY OF

1 AMERICAN MADE PRODUCTS INVOLVING AMERICAN
2 COMPANIES.

3 THIS IS A CASE OF AMERICAN MADE PRODUCTS
4 AND PIRACY, ESSENTIALLY, COPYING -- WHOLESALE
5 COPYING OF THE LOOK AND FEEL --

6 THE COURT: BY A GERMAN COMPANY --

7 MR. GRAY: YES. AND THAT IS
8 DISTINGUISHABLE. THE COURT IN CREATIVE SAID, NO,
9 THEY ARE SINGAPORE COMPANIES.

10 THE COURT: RIGHT.

11 MR. GRAY: AND, ADDITIONALLY, IN THE
12 LOCKMAN CASE THE MAIN ISSUE IN THAT CASE WAS THE
13 JAPANESE COPYRIGHT ISSUE. IT FLOWED THROUGH EVERY
14 CLAIM THAT THE PLAINTIFF WAS TRYING TO BRING.

15 THE PLAINTIFF HAD A 30-YEAR RELATIONSHIP WITH
16 THE ASIAN COMPANY THAT IT THEN TURNED AROUND AND
17 SUED. ALL OF THE COPYRIGHT ISSUES WERE IN JAPAN
18 AND ASIA AND THE PRODUCTS SOLD WERE IN JAPAN AND
19 ASIA.

20 SO WE ARE LOOKING AT ANOTHER SUIT BECAUSE
21 ALL THE UNDERLYING ACTIONS WERE THERE, AND
22 ESSENTIALLY THE HARM FOR THOSE JAPANESE COPYRIGHTS
23 WAS IN JAPAN.

24 THE COURT: OKAY.

25 MR. GRAY: ONE OTHER POINT I'D LIKE TO

1 MENTION, YOUR HONOR, IN TERMS OF THE GERMAN AND
2 U.S. CASE --

3 THE COURT: YES.

4 MR. GRAY: FACEBOOK SHOWED ITS INDICATION
5 TO BE HERE IN THIS FORUM. COINCIDENTALLY ENOUGH,
6 WE BOTH FILED SUIT ON THE SAME DAY.

7 SO THEY FILED IN GERMANY THEIR
8 DECLARATORY RELIEF ACTION AND WE FILED HERE, SAME
9 DAY. WE CLEARLY INDICATED OUR INTENT TO BE HERE.

10 AGAIN, COUNSEL IS APPLYING U.S. THOUGHT
11 AND U.S. PROCEDURES TO THE CLAIMS IN GERMANY. YES
12 WE ARE PLAINTIFF IN COLOGNE, BUT AS WE POINTED OUT
13 IN THE KATHARINA SCHEJA DECLARATION, I THINK DOCKET
14 NUMBER 126, THAT PROCEDURE IS LARGEMLY A
15 COUNTERCLAIM TO A DECLARATORY RELIEF ACTION.

16 WE DIDN'T HAVE THE SAME OPPORTUNITIES TO
17 STAY OR DISMISS THOSE CLAIMS IN GERMANY. IT'S A
18 DIFFERENT SYSTEM WITH DIFFERENT PROCEDURES.

19 THE FACT WE ARE PLAINTIFF IN COLOGNE IS
20 JUST COUNTERCLAIMS TO THE DECLARATORY JUDGMENT
21 ACTION TIMED BY THESE FOLK.

22 THE COURT: WELL, BEST EFFORTS IN A
23 DECLARATORY JUDGMENT ACTION, ANYWAY.

24 THE POINT IS IT'S LARGEMLY THE SAME
25 DISPUTE. AND YOU ARE REALLY ARGUING ABOUT WHERE IT

1 OUGHT TO BE HEARD.

2 MR. GRAY: WELL, WE DISAGREE WITH THAT,
3 OBVIOUSLY, AS WE'VE TALKED ABOUT. WE DON'T THINK
4 IT'S LARGEMLY THE SAME DISPUTE. BUT FOR THEIR
5 FILING THE DECLARATORY RELIEF ACTION, WE WOULD NOT
6 BE HERE, FACEBOOK WOULD NOT BE IN GERMANY.

7 THE COURT: I THINK WE'VE HAD A GOOD
8 DISCUSSION, AND I WILL GIVE THE MATTER SOME THOUGHT
9 AND I'LL GET A DECISION OUT SOON.

10 MR. GRAY: THANK YOU, YOUR HONOR.

11 MR. SMITH: I DID WANT TO RESPOND TO ONE
12 POINT.

13 THE COURT: REALLY? YOU DON'T THINK
14 YOU'VE HAD ENOUGH ORAL ARGUMENT? YOU'VE HAD HALF
15 AN HOUR. THAT'S ABOUT TEN TIMES MORE THAN MOST
16 PARTIES GET.

17 MR. SMITH: THE LAWSUIT DOESN'T START
18 JULY 18TH, 2008. THEY SENT DEMAND LETTERS IN
19 JANUARY 2007. WE ACTUALLY FILED IN COURT IN
20 GERMANY WHICH WAS AN ANTICIPATED DEFENSE.

21 SO THE GERMAN-NESS OF THIS DISPUTE IS
22 IT'S GENESIS.

23 THE COURT: OKAY. WELL, I'M ACTUALLY
24 GOING TO GO BACK AND LOOK AT THE FILINGS AND I WILL
25 MAKE MY OWN JUDGMENT OF THAT.

1 THANK YOU.

2 MR. SMITH: THANK YOU, YOUR HONOR.

3 MR. GRAY: I'M SORRY, YOUR HONOR THIS IS
4 REALLY -- ARE WE ON FOR THE CMC CALENDAR --

5 THE COURT: I'M NOT GOING TO DO THE CMC
6 UNTIL I DECIDE THE CASE. I WILL GIVE YOU NOTICE.

7 THANK YOU.

8 (WHEREUPON, THE PROCEEDINGS IN THIS
9 MATTER WERE CONCLUDED.)

1
2
3
4 **CERTIFICATE OF REPORTER**
5
6
7

8 I, THE UNDERSIGNED OFFICIAL COURT
9 REPORTER OF THE UNITED STATES DISTRICT COURT FOR
10 THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
11 FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
12 CERTIFY:

13 THAT THE FOREGOING TRANSCRIPT,
14 CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
15 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
16 SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
17 HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
18 TRANSCRIPTION TO THE BEST OF MY ABILITY.

19
20
21
22 -----
23 SUMMER A. CLANTON, CSR
24 CERTIFICATE NUMBER 13185
25